Kesatuan Kebangsaan Pekerja-pekerja Hotel, Bar dan Restoran Semenanjung Malaysia v MTB Realty Sdn Bhd/Renaisance Melaka Hotel

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R2–25–18 OF 2002
FAIZA THAMBY CHIK J
21 JANUARY 2003

Labour Law *— Industrial Court — Admissibility of evidence — Unsigned, undated and unaudited accounts — Whether Industrial Court could accept such evidence — Whether acceptance of such evidence fatal to award — Industrial Relations Act 1967 s 29(c)*

Labour Law *— Industrial Court — Award — Delay in making award — Whether such delay permitted — Whether reasons for delay must be given in award — Whether failure to give reasons meant no valid reasons — Industrial Relations Act 1967 s 30(3)*

Labour Law *— Industrial Court — Finding of fact — Award — Finding of fact not based on proper evidence — Whether such finding of fact open to review — Whether award of Industrial Court irrational and unreasonable — Whether award of Industrial Court ought to be set aside*

The parties were at all material times bound by various collective agreements ('CA') governing the terms and conditions of employees engaged in the hotel business of the respondent. The parties had failed to conclude a proposed fifth CA for the period 1 January 1998 to 31 December 2000, thus giving rise to a trade dispute. On 28 January 2000, the Minister referred the trade dispute to the Industrial Court for a decision. The Industrial Court heard the matter on 3 August 2000 and 14 September 2000 and handed down an award on 8 January 2002. The Industrial Court found that the Union's claims were unjustified and thus ordered that no adjustments be made to the terms and conditions of the fifth CA. The Union sought to quash the award on the grounds that the Industrial Court had acted irrationally and unreasonably.

Held, allowing the application and quashing the award:

(1) The Industrial Court had found, as a fact, that the respondent was paying better wages than the Emperor Hotel, one of the other hotels in Malacca. A comparison between the relevant CA, however, did not show that, generally, the respondent was paying better wages than the Emperor Hotel. Although there were some designations in the respondent's hotel where wages were higher than the Emperor Hotel, the Emperor Hotel generally paid better wages than the respondent's hotel. In making the award, the Industrial Court had relied on a comparative study of wages based on the Emperor Hotel's wages under its old and expired first CA with the expired fourth CA of the respondent. The Industrial Court had failed to compare the provision on wages under the

A Emperor Hotel's second prevailing CA and the prevailing wages of the respondent's hotel that were relevant for the proposed fifth CA (see pp 426G–H, 427G–428B).

(2) There had been undue delay in making the award. Although the Minister's reference to the Industrial Court was dated 28 January 2000, the award was handed down only on 8 January 2002. There was a delay of almost two years after the Minister's reference and 14 months after the conclusion of the hearing. No reasons for the delay had being given. Although s 30(3) of the Industrial Relations Act 1967 ('the Act') permitted the Industrial Court to act without delay 'where practicable', if it had not been practicable for the Industrial Court to act without a delay of about two years, it was duty bound to give reasons for the delay. Since it did not, it could be assumed that the Industrial Court did not have good reasons for the delay and the Industrial Court had acted contrary to s 30(3) of the Act (see pp 428F–429A); *Pahang South Union Omnibus Co Bhd v Minister of Labour & Manpower & Anor* [1981] 2 MLJ 199 followed.

(3) The proposed fifth CA was for the period 1 January 1998 to 31 December 2000 whereas the award was given approximately two years after the expiry of the proposed fifth CA period. In other words, the award of the Industrial Court was in respect of a period which was already past or thus non-existent. Nowhere in the Act was the Industrial Court permitted to do this exercise (see p 429A–B).

(4) The Industrial Court had relied on unsigned, undated and unaudited documents. The respondent, not denying that the said documents were unsigned, undated and unaudited, averred that the documents had been tendered without any objections being raised by the applicant. Section 29(c) of the Act empowers the Industrial Court to admit 'evidence'. It is trite law that unsigned, undated and unaudited documents are not 'evidence'. In admitting such 'evidence', the Industrial Court erred in law. An error of law made by the Industrial Court was jurisdictional in nature. The applicant's failure to object was not fatal because there could be no consent, acquiescence or estoppel where it related a question of the jurisdiction of the Industrial Court (see p 429C–F); *Federal Hotel Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers* [1983] 1 MLJ 175 followed.

(5) The Industrial Court had acknowledged that the respondent, the owner of the Renaissance Melaka Hotel, had also been engaged in other non-hotel related business. For the purposes of the proposed fifth CA, only the facts and figures pertaining to the hotel business of the respondent were relevant. The Industrial Court could only take into account these relevant facts and figures. Instead the Industrial Court took into account facts and figures pertaining to the non-hotel business of the respondent.

The Industrial Court had therefore acted in breach of the mandatory provisions of s 30(5) of the Act taking into account the 'legal form' of the respondent as a corporate body without regard to the 'substantial merits' of the viability of the respondent's hotel business (see p 430F–H); *Mersing Omnibus Co Sdn Bhd v Kesatuan Pekerja-Pekerja Pengangkutan Semenanjung Malaysia & Anor* [1999] 1 MLJ 44 followed.

(6) The Industrial Court acknowledged the respondent's admission that, but for the deductions for renovations, and the provisions for furniture, fittings and equipment, the respondent would be making a profit. The respondent had further admitted that 'renovation' was a capital expenditure and not an operating expenditure. Further the provisions for renovation had not been fully incurred. The provisions for furniture, fittings and equipment were merely provisions for such expenditure. Capital expenditures and mere provisions Bar dan Restoran Semenanjung Malaysia v MTB Realty Sdn Bhd/Renaisance Melaka Hotel be taken into account in ascertaining the financial capacity of the respondent (see p 431D–F); *Toweltech Sdn Bhd v Kesatuan Pekerja-Pekerja Perusahaan Membuat Tekstil dan Pakaian Pulau Pinang & Seberang Perai* (2000) 1 ILR 591 followed.

[Bahasa Malaysia summary

Pihak-pihak pada setiap masa material terikat oleh beberapa perjanjian bersama ('CA') merangkumi terma dan syarat pekerja-pekerja yang berkhidmat dalam perniagaan hotel responden. Pihak-pihak telah gagal memutuskan CA kelima yang disyorkan bagi tempoh 1 Januari 1998 hingga 31 Disember 2000, maka wujudnya suatu pertikaian perindustrian. Pada 28 Januari 2000, YB Menteri telah merujukkan pertikaian perindustrian tersebut kepada Mahkamah Perusahaan untuk penyelesaian. Mahkamah Perusahaan telah mendengar perkara itu pada 3 Ogos 2000 dan 14 September 2000 dan memberikan awardnya pada 8 Januari 2002. Mahkamah Perusahaan mendapati tuntutan pemohon tidak bermerit dan mengarahkan supaya tiada sebarang penyesuaian dibuat kepada terma dan syarat CA kelima. Pemohon memohon mengenepikan award tersebut di atas alasan bahawa Mahkamah Perusahaan telah bertindak tidak rasional serta tidak munasabah.

Diputuskan, membenarkan permohonan tersebut dan mengenepikan award tersebut:

(1) Mahkamah Perusahaan berpendapat, sebagai suatu fakta, bahawa responden membayar gaji yang lebih lumayan berbanding Emperor Hotel, suatu daripada hotel yang lain di Melaka. Sebaliknya, suatu perbandingan antara CA yang relevan tidak menunjukkan bahawa responden membayar gaji yang lebih lumayan berbanding Emperor Hotel. Walaupun terdapat

beberapa jawatan dalam hotel responden di mana gajinya lebih lumayan, berbanding Emperor Hotel, Emperor Hotel secara amnya membayar gaji yang lebih lumayan berbanding hotel responden. Semasa membuat award tersebut, Mahkamah Perusahaan telah bergantung kepada suatu kajian perbandingan gaji berasaskan gaji yang dibayar Emperor Hotel di bawah CA pertamanya yang telah lupus dengan CA keempat responden yang lupus. Mahkamah Perusahaan gagal membandingkan peruntukan gaji di bawah CA kedua Emperor Hotel yang berkuatkuasa dengan gaji semasa hotel responden yang relevan bagi CA kelima yang disyorkan (lihat ms 426G–H, 427G–428B).

(2) Wujudnya kelewatan yang tidak wajar dalam membuat award tersebut. Walaupun rujukan YB Menteri kepada Mahkamah Perusahaan bertarikh 28 January 2000, award tersebut hanya diberikan pada 8 Januari 2002. Terdapat kelewatan hampir dua tahun selepas rujukan YB Menteri dan 14 bulan selepas akhirnya perbicaraan. Tiada sebarang alasan diberikan bagi kelewatan tersebut. Walaupun s 30(3) Akta Perhubungan Perindustrian 1967 ('Akta tersebut') membenarkan Mahkamah Perusahaan bertindak tanpa kelewatan 'di mana dapat dipraktikkan', sekiranya ia tidak dapat dipraktikkan Mahkamah Perusahaan bertindakkan tanpa kelewatan hampir dua tahun, maka Mahkamah Perusahaan berkewajipan memberi alasan bagi kelewatan tersebut. Memandangkan yang ia telah gagal berbuat demikian, maka dapat dianggap Mahkamah Perusahaan tiada alasan yang kukuh bagi kelewatan tersebut dan Mahkamah Perusahaan telah bertindak bercanggah s 30(3) Akta tersebut (lihat ms 428F–429A); *Pahang South Union Omnibus Co Bhd v Minister of Labour & Manpower & Anor* [1981] 2 MLJ 199 diikut.

(3) CA kelima yang disyorkan adalah bagi tempoh 1 Januari 1998 hingga 31 Disember 2000 namun award tersebut diberikan hampir dua tahun selepas tamatnya tempoh CA kelima yang disyorkan itu. Dalam kata-kata lain, award Mahkamah Perusahaan tersebut adalah bagi suatu tempoh yang telah lalu atau tidak wujud. Tiada sebarang peruntukan dalam Akta tersebut membenarkan Mahkamah Perusahaan berbuat demikian (lihat ms 429A–B).

(4) Mahkamah Perusahaan telah bergantung kepada dokumen yang tidak ditandatangani, tidak bertarikh dan belum diaudit. Responden, tanpa menafikan bahawa dokumen tersebut tidak ditandatangani, tidak bertarikh dan belum diaudit, berhujah bahawa dokumen tersebut telah dikemukakan tanpa sebarang bantahan dari pemohon. Seksyen 29(c) Akta tersebut memberi kuasa kepada Mahkamah Perusahaan menerima 'keterangan'. Adalah tidak diragui bahawa dokumen yang tidak ditandatangani, tidak bertarikh dan belum diaudit bukannya 'keterangan'. Dengan menerima 'keterangan' sedemikian, Mahkamah Perusahaan membuat kesilapan undang-undang. Suatu kesilapan

undang-undang yang dibuat Mahkamah Perusahaan adalah kesilapan bidang kuasa. Kegagalan pemohon membantah tidak membawa padah kerana tidaklah wujud persoalan persetujuan, akuiesens ataupun estoppel di atas bidang kuasa Mahkamah Perusahaan dipersoalkan (lihat ms 429C–F); *Federal Hotel Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers* [1983] 1 MLJ 175 diikut.

(5) Mahkamah Perusahaan telah mengakui bahawa responden, tuan punya Renaissance Melaka Hotel, juga menjalankan perniagaan lain yang tidak berkaitan dengan perniagaan hotelnya. Bagi maksud CA kelima yang disyorkan, hanya fakta dan angka-angka berkaitan perniagaan hotel responden adalah relevan. Mahkamah Perusahaan hanya dapat mengambil kira fakta dan angka-angka yang relevan ini. Sebaliknya Mahkamah Perusahaan telah mengambil kira fakta dan angka-angka berkaitan perniagaan responden selain perniagaan hotel. Maka Mahkamah Perusahaan telah bertindak bercanggah peruntukan mandatori s 30(5) Akta tersebut dalam mengambil kira sifat undang-undang responden sebagai badan korporat tanpa mengambilkira 'merit substantif' keesahan perniagaan hotel responden (lihat ms 430F–H); *Mersing Omnibus Co Sdn Bhd v Kesatuan Pekerja-Pekerja Pengangkutan Semenanjung Malaysia & Anor* [1999] 1 MLJ 44 diikut.

(6) Mahkamah Perusahaan telah menerima pengakuan responden bahawa, jika tidak termasuk tolakan bagi pengubahsuaian dan peruntukan bagi perabot, kelengkapan dan alat-alat, responden akan mendapat untung. Responden seterusnya mengakui bahawa 'pengubahsuaian' merupakan suatu perbelanjaan modal dan bukannya perbelanjaan pengendalian. Lebih-lebih lagi perbelanjaan bagi pengubahsuaian belum dilaksanakan sepenuhnya. Peruntukan bagi perabot, kelengkapan dan alat-alat semata-mata peruntukan bagi perbelanjaan tersebut. Perbelanjaan modal dan peruntukan semata-mata tidak patut diambil kira dalam mengenal pasti kebolehan kewangan responden (lihat ms 431D–F); *Toweltech Sdn Bhd v Kesatuan Pekerja-Pekerja Perusahaan Membuat Tekstil dan Pakaian Pulau Pinang & Seberang Perai* (2000) 1 ILR 591 diikut.]

Notes

For cases on awards in the Industrial Court, see 8(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1178–1214.

For cases on the admissibility of evidence in the Industrial Court, see 8(1) *Mallal's Digest* (4th Ed, 2001 Reissue) para 1177.

For cases on the finding of facts of the Industrial Court, see 8(1) *Mallal's Digest* (4th Ed, 2001 Reissue) para 1243.

Cases referred to

Council of Civil Service Unions and Ors v Minister for the Civil Service [1985] AC 374 (refd)

Federal Hotel Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers [1983] 1 MLJ 175 (folld)
General Electric Co v Price Commission (1975) ICR 1 (refd)
Hyatt Kuantan v NUHBRW (1988) 2 ILR July 29 (refd)
Kesatuan Kebangsaan Wartawan Malaysia & Anor v Syarikat Pemandangan Sinar Sdn Bhd [2001] 3 MJ 705 (refd)
Malayan Banking Bhd v Association of Maybank Class One Officers [2001] 6 MLJ 625 (refd)
Mersing Omnibus Co Sdn Bhd v Kesatuan Pekerja-Pekerja Pengangkutan Semenanjung Malaysia & Anor [1999] 1 MLJ 44 (folld)
Minister of Home Affairs v Persatuan Aliran Kesedaran Negara [1990] 1 MLJ 351 (refd)
OMX Agro Produce (M) Sdn Bhd v Chairman, Industrial Court, Malaysia & Anor [1999] 5 MLJ 636 (refd)
Pahang South Union Omnibus Co Bhd v Minister of Labour & Manpower & Anor [1981] 2 MLJ 199 (folld)
Toweltech Sdn Bhd v Kesatuan Pekerja-Pekerja Perusahaan Membuat Tekstil dan Pakaian Pulau Pinang & Seberang Perai (2000) 1 ILR 591 (folld)
Shivraj Fine Art's Litho Works v State Industrial Court Nagpur 1978 LAB IC 828 (refd)

Legislation referred to

Industrial Relations Act 1967 ss 26(2), 29(c), 30(3), (4), (5), 33(1), 33B(1)

Angeline Low (*Lobo & Assoc*) for the applicant.
Raymond Low (*Shearn Delamore & Co*) for the respondent.

Faiza Thamby Chik J: This is an application by Kesatuan Kebangsaan Pekerja-pekerja Hotel, Bar dan Restoran, Semenanjung Malaysia 'the applicant') to quash the Industrial Court award No 7 of 2002 dated 8 January 2002 ('the said award') and for consequential/alternative orders referred to in the application. The Industrial Court vide the said award had refused to allow the applicant's claims in respect of the fifth collective agreement between the applicant and MTC Realty Sdn Bhd/Renaissance Melaka Hotel ('the respondent') in terms prayed for by the applicant in exh U1(b) of the applicant's statement of case (see exh CP-2' of the applicant's affidavit at p 8 of encl 1) ('the proposed fifth CA'). The respondent and the applicant were at all material times bound by various collective agreements governing the terms and conditions of employees engaged in the hotel business of the respondent. The respondent and the applicant had failed to conclude the proposed fifth CA for the period 1 January 98 to 31 December 2000 giving rise to a trade dispute. On 28 January 2000, YB the minister referred the trade dispute to the Industrial Court for a decision under s 26(2) of the Industrial Relations Act 1967 ('the Act'). The case was heard by the Industrial Court on 3 August 2000 and 14 September 2000. In the said award, the Industrial Court made

a finding that the applicant's claims were unjustified and ordered that there be no adjustments to the terms and conditions of the fifth collective agreement between the parties which was to be for the period 1 January 1998 to 31 December 2000.

The applicant prays for the following relief (see statement in encl (1)):

(a) an order of certiorari to quash the said award;

(b) an order of mandamus directed to the Industrial Court to make a proper finding of fact and law;

or in the alternative,

(c) a declaration that the respondent was at all material times operating at a profit;

and/or,

(d) such other relief that this court deems just; and

(e) costs of this application.

The applicant submitted that the Industrial Court had acted irrationally, unreasonably and illegally in making the said award. In *Minister of Home Affairs v Persatuan Aliran Kesedaran Negara* [1990] 1 MLJ 351, the Supreme Court had cited with approval the following passage from *Council of Civil Service Unions and Ors v Minister for the Civil Service* [1985] AC 374:

> ... Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which the administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'... By 'irrationality', I mean what can now be succinctly referred to as 'Wednesbury unreasonableness' (*Associated Provincial Picture Houses Ltd v Wednesbury Corp* (1948) 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it ...

I am of the opinion that the Industrial Court had acted irrationally and unreasonably in finding that the respondent is paying better wages than the Emperor Hotel Sdn Bhd ('Emperor Hotel'), which is one of the hotels in Malacca. Thus in making the said award, the Industrial Court had breached s 30(4) and (5) of the Act. This fact is supported by para 6.4 of the applicant's affidavit, the fourth collective agreement between the applicant and the respondent for the period 1 January 1995–31 December 1997 ('the fourth CA'), and a Collective Agreement between the applicant and Emperor Hotel for the period 1 June 1997–31 May 2000 ('Emperor's second CA'). However, a comparison between the previous fourth CA (prior to the proposed fifth CA)(at pp 83 and 84 of encl (1)) and Emperor's second CA (at pp 114–116 of encl (1)) will show that the documentary evidence pertaining to the applicant's averments was overwhelming. Generally, the respondent was not paying better wages than Emperor Hotel. This was highlighted to the Industrial Court by the applicant's

representative during the Industrial Court proceedings (see p 9 of 'exh SLG-1' of the second affidavit ('exh SLG-1')) when the applicant's representative compared the wages of a captain and a steward in both the Emperor Hotel and the respondent's hotel. A comparison of the documentary evidence at pp 83–84 and pp 114–116 of encl (1) further show that Emperor Hotel generally pays better wages than the respondent's hotel.

Designations	Respondent's Hotel Minimum Salary (RM)	Emperor Hotel's Minimum Salary (RM)
Hostess	253	320
Waiter/Waitress	215	270
Kitchen Helper	204	270
Chief Cashier	385	420
Senior Technician	429	470
Technician	363	420
Handyman	215	370
Reservation Supervisor	385	420
Driver	253	320
Clerk	253	320
Assistant Laundry Supervisor	253	70
Laundry Attendant	204	270
Lifeguard	253	420
Pool Attendant	204	270

It is noted that only like titles between the two hotels are compared. Although there were some designations in the respondent's hotel where wages were higher than Emperor's Hotels, generally Emperor's Hotel's wages were higher than the respondent's hotel. Despite the evidence that was led before it, the Industrial Court held that '... if a comparative study is made against the wages offered by the Emperor Hotel in Malacca it will be seen that the hotel (respondent) pay better wages (see p 187 of encl (1)). In making the aforesaid finding, I think the Industrial Court had acted on an incorrect basis of fact as follows:

(i) It relied on a comparative study of wages which was based on Emperor Hotel's wages under its old and expired collective agreement

('Emperor's first CA') (see statement by the respondent's witness at p 4 of exh SLG-1); A

(ii) It compared the wages of Emperor Hotel under Emperor first CA with the expired collective agreement of the respondent with the applicant under the fourth CA. The Industrial Court failed to compare the provision on wages of Emperor Hotel's second prevailing collective agreement (see p 95 of encl (1)) and the prevailing wages of the respondent's hotel that are relevant in view of the, proposals for the proposed fifth CA between the applicant and the respondent as adverted to in the pleadings of the applicant. In doing so, the Industrial Court ignored the provisions of the proposals for the proposed fifth CA in the pleadings of the applicant. I think to ignore pleadings of the parties is an error of jurisdiction (see *OMX Agro Produce (M) Sdn Bhd v Chairman, Industrial Court, Malaysia & Anor* [1999] 5 MLJ 636). B C

In failing to compare the then prevailing wage rate between two hotels of similar sizes in the same 'industry', the Industrial Court did not take into account that Emperor Hotel was paying higher wages generally and therefore the applicant's claims were reasonable. Hence, the Industrial Court acted contrary to s 30(4) of the Act which requires it to have regard to '... the effect of the award ... on the industry concerned therefore acting in excess of jurisdiction. It is trite law that this entitles the High Court to quash the Industrial Court award. Further, in not taking into account Emperor Hotel's higher salaries, the Industrial Court had acted inequitably in breach of s 30(5) of the Act by refusing the applicant's claim for an increase in wages. This is also a jurisdictional error. D E

I view the Industrial Court had acted irrationally and unreasonably and contrary to s 30(3) of the Act by the undue delay in making the said award. This is supported by paras 7(a) and (b) of the applicant's affidavit, the 'YB Minister's reference letter (JPPM 1/10/127/208 (3/2000) dated 28 January 2000 (see 'exh CP-1' of the applicant's affidavit at pp 1–3 of encl (1)), the unrefuted paras 3.2 and 6.2 of the applicant's affidavit and the said award (see 'exh CP-7A' of the applicant's affidavit at pp 177–188 of encl (1)). This shows that the said award was handed down on 8 January 2002. There was a delay of almost two years after the YB Minister's reference and 14 months after the conclusion of the hearing without reasons being given (see p 188 of encl (1) and unrefuted para 6.2 of the applicant's affidavit). Section 30(3) of the Act states that: F G

> ... the court shall make its award without delay and where practicable within thirty days from the date of reference to it of the trade dispute or of a reference to it under s 20(3). H

Although this section gives an escape clause for the Industrial Court, ie to act without delay 'where practicable', I think if it was not practicable for the Industrial Court to hand down the said award without a delay of about two years, it is duty bound to give reasons for the same. Since it did not, it can be assumed that the Industrial Court did not have good reasons for the delay (see *Pahang South Union Omnibus Co Bhd v Minister of Labour &* I

Manpower [1981] 2 MLJ 199 quoting the case of *General Electric Co v Price Commission* (1975) ICR 1). Therefore, since the Industrial Court did not have good reasons for the delay, the Industrial Court had acted contrary to s 30(3) of the Act since such delay is not practicable. Further, the delay is also irrational by virtue of the fact that the proposed fifth CA was for the period 1 January 1998–31 December 2000 whereas the said award was given approximately two years after the expiry of the proposed fifth CA period (see unrefuted para 3.2 of the applicant's affidavit). In other words, the said award of the Industrial Court was in respect of a period which was already past or nonexistent. I think nowhere in the Act is the Industrial Court permitted to do this exercise. This is therefore irrational.

The Industrial Court had acted irrationally and unreasonably by relying on unsigned, undated and unaudited documents in 'exh CP-6A' of the applicant's affidavit (see pp 121 121–141 of encl (1)). This is evidenced by para 7(c) of the applicant's affidavit, para 5.6 of the applicant's affidavit and 'exh CP-6A' of the applicant's affidavit at pp 121–141 of encl (1). It is observed that the respondent in its affidavit has not denied the fact that the said documents in exh CP-6A were unsigned, undated and unaudited. However, in para 8 of the respondent's affidavit in Reply, it is averred that the said documents 'were tendered (in the Industrial Court) without any objections raised by the applicant'. Section 29(c) of the Act only empowers the Industrial Court to admit 'evidence'. It is trite law that unsigned, undated and unaudited documents are not even 'evidence'. Therefore the Industrial Court in doing as it did erred in law. It is trite law that an error of law made by the Industrial Court is jurisdictional in nature. On the question on non-objection by the applicant's representative in the Industrial Court in relation to the unsigned, undated and unaudited documents in exh CP-6A, I think that where it involves matters of jurisdiction, failure to object is not fatal simply because there can be no consent, acquiescence or estoppel by any party when it relates to the jurisdiction of the Industrial Court (see *Federal Hotel Sdn Bhd v National Union of Hotel, Bar and Restaurant Workers* [1983] 1 MLJ 175). Despite this the Industrial Court relying, on the said documents made a finding, that the respondent was suffering from financial incapacity and that the '... Hotel industry particularly in Malacca as shown by evidence produced by the company faced serious problem caused by the drop in the number of tourists (see p 187 of encl (1)). In making the aforesaid finding the Industrial Court relied on inter alia the following (see exh CP-7A at pp 185 and 187 of encl (1)):

(i) unsigned, undated and unaudited Comparative Statement of Income and Expenses of the respondent (see exh CP-6A at pp 123–128 of encl (1));

(ii) unsigned, undated and unaudited revenue report and room performance of the respondent's hotel (see exh CP-6A at pp 137–141 of encl (1)); and

(iii) unverified survey report of hotels in Malacca (see exh CP06A at pp 129–130 of encl (1)).

All the above documents formed part of the respondent's bundle of documents that was marked by the Industrial Court as 'exh CO B1'. This is 'evidence' that the Industrial Court acted illegally contrary to s 29(c) of the Act. It is noted that the Industrial Court had acted irrationally and unreasonably by relying wholly on those documents without regard to any of the oral evidence of the respondent's own witness on this issue which is as follows:

(i) the admission by the respondent's witness that the whole of CO B1 was not submitted to the authorities, namely the Income Tax Department (see p 5 of exh SLG-1). Therefore its contents were suspicious and unreliable;

(ii) the testimony of the respondent's witness (see above) that '...I am not sure who prepares these survey reports. They are from PKNM & LPPM. I cannot vouch the accuracy of these figures ...' (see pp 3 and 4 of exh SLG-1).

The Industrial Court had therefore acted irrationally and unreasonably for acting on these documents and ignoring the respondent's own witness' oral evidence which put into question the reliability of CO B1. The Industrial Court therefore acted in excess of jurisdiction ie on an incorrect basis of fact. In *Malayan Banking Bhd v Association of Maybank Class One Officers* [2001] 6 MLJ 625, it was held that a supervisory court can review a decision on its substance (at p 633):

> ... if the Tribunal has committed an error where:
>
> (a) it relied upon an erroneous factual conclusion, or
>
> (b) where there is no evidence to support its conclusion.

It is my finding that the Industrial Court did not consider s 30(5) of the Act and had therefore acted contrary to the said provision and is further in breach of s 30(4) of the Act. I rely on pp 7(d) and (e) of the applicant's affidavit, and the undisputed facts in para 2.3 of the applicant's affidavit. The Industrial Court acknowledged that the respondent (MTB Realty Sdn Bhd), the owner of Renaissance Melaka Hotel, is also engaged in non-hotel related business such as hardware dealers, fertilizers and estate supply ('non-hotel business') (see exh CP-7A at p 182 of encl (1)). For purposes of the proposed fifth CA, facts and figures pertaining to only the hotel business of the respondent are relevant. The Industrial Court should therefore only take into account these relevant facts and figures. The Industrial Court however did not do this. The Industrial Court instead took into account irrelevant facts and figures ie facts and figures pertaining to the non-hotel business of the respondent. The Industrial Court had therefore acted irrationally and unreasonably and is in breach of the mandatory provisions of s 30(5) of the Act be taking into account the 'legal form' of the respondent ie the accounts of the respondent as a corporate body without regard to the 'substantial merits' of the viability of the hotel business (only) of the respondent. In *Mersing Omnibus Co Sdn Bhd v Kesatuan Pekerja-Pekerja Pengangkutan Semenanjung Malaysia & Anor* [1999] 1 MLJ 44, it was held that the Industrial Court ought to direct its attention to the

A mandatory provisions under the Act and mention it in the award. Therefore, the fact that s 30(5) of the Act was not mentioned in the said award shows that the Industrial Court did not take relevant mandatory provisions of s 30(5) into account in making the said award. By acting in breach of s 30(5) of the Act and by taking into account irrelevant facts and figures, the Industrial Court had made an erroneous finding that the B respondent's hotel was not able to pay the increase in wages and improvement in benefits claimed by the applicant. The Industrial Court had acted inequitably and therefore committed a further breach of s 30(5) when it relied on the aforesaid erroneous finding in refusing the applicant's claim. Further, in taking into account the non-hotel business of the C respondent, the Industrial Court acted in breach of s 30(4) of the Act. That section requires the Industrial Court to have regard to the 'industry concerned', ie the hotel industry or business of the respondent and not the non-hotel business of the respondent. Therefore by taking into account the viability or otherwise of the non-hotel business of the respondent, the Industrial Court acted in breach of s 30(4) of the Act. This is jurisdictional D error since s 30(4) is phrased in mandatory terms.

The Industrial Court had at p 185 of encl (1) acknowledge the respondent's admission that, but for the deductions of the provisions for renovation, furniture, fittings and equipment, the respondent would be making a profit (see also p 3 of exh SLG-1). The respondent had further E admitted:

(i) that 'Renovation' is a capital expenditure and not an operating expenditure and that the provision for renovation was not fully incurred (see pp 4 and 5 of exh SLG-1);

F (ii) that the provision for FF & E' was merely a provision for furniture, fittings and equipment (see p 5 of exh SLG-1).

Capital expenditures and mere provisions should not be taken into account in ascertaining the financial capacity of the respondent. The law in this area is clear, ie that there should be no deductions for provisions for income tax, G reserves and depreciation when ascertaining the financial capacity of a company: *Shivraj Fine Art's Litho Works v State Industrial Court Nagpur* 1978 LAB IC 828 followed in *Toweltech Sdn Bhd v Kesatuan Pekerja-Pekerja Perusahaan Membuat Tekstil dan Pakaian Pulau Pinang & Seberang Perai* (2000) 1 ILR 591. The Industrial Court had therefore committed an error of law by refusing to follow its own previous decision (in *Toweltech*'s case) H when it took into account the deductions for provisions for renovation, furniture, fittings and equipment in determining the financial capacity of the respondent. The Industrial Court's reason for departing from its own previous decision is irrational. The Industrial Court at p 186 of encl (1) stated that:

I

> ... with respect this court does not agree with the judgment (in *Toweltech*'s case) in respect of reserve for depreciation. In the Hotel business unless the property is continuously maintained it will lose its business...

In making the aforesaid finding, the Industrial Court had ignored other established law (12 years ago) in the hotel industry found in cases such as Kuantan Beach Hotel Sdn Bhd — *Hyatt Kuantan v NUHBRW* (1988) 2 ILR July 29. In the said case, the court had rightly pointed out that in ascertaining the financial capacity of the hotel, deductions of income tax, reserves and depreciation are not permissible. The Industrial Court had therefore acted contrary to the mandatory provision of s 30(4) of the Act which requires the Industrial Court to have regard to the effect of its award on the industry concerned.

I am of the view that the Industrial Court had committed several jurisdictional errors of law and fact in making the said award. In doing so, it had failed to have regard to the effect of the said award in that it may cause industrial disharmony within the hotel industry. This is contrary to the overall legislative purpose of the Act to Promote social justice, industrial peace and harmony ...' as propounded in *Kesatuan Kebangsaan Wartawan Malaysia & Anor v Syarikat Pemandangan Sinar Sdn Bhd* [2001] 3 MJ 705. In view of this, the said award should not be allowed to stand. It is trite law that despite the ouster section in s 33(1) of the Act, when the Industrial Cout commits jurisdictional error of this nature, the High Court in its supervisory jurisdiction can quash the said award. This principle is based on a dual-legal basis:

(a) the first is that the common law presumes that where Parliament has entrusted to the Industrial Court certain powers of decision-making under the Act, there is presumption that the Industrial Court has no powers to exceed the jurisdiction given to it under the Act. I am reinforced in this by the opening words of s 33B(1) of the Act: '... Subject to this Act ... Hence when the Industrial Court acts in breach of the mandatory provisions of s 30(3), (4) and (5) of the Act, it exceeds its jurisdiction;

(b) the second legal basis is that the High Court being the supervisory body, has to ensure that the Industrial Court complies with this common law presumption and the opening words of s 33B(1) aforementioned. This is the basis for this application.

For these reasons, I grant order in terms of prayer (a) of the application and costs.

Application allowed and award quashed.

Reported by Sivapragasam Kumaran